

FEDERAL COURT OF AUSTRALIA

Mudiyanselage v Minister for Immigration and Citizenship [2013] FCA 266

Citation: Mudiyanselage v Minister for Immigration and Citizenship [2013] FCA 266

Appeal from: Mudiyanselage v Minister for Immigration & Anor [2012] FMCA 887

Parties: **SURANGANI DILUPA WEERASINGHA
MUDIYANSELAG v MINISTER FOR
IMMIGRATION AND CITIZENSHIP and
MIGRATION REVIEW TRIBUNAL**

File number: NSD 1560 of 2012

Judge: **TRACEY J**

Date of judgment: 27 March 2013

Catchwords: **MIGRATION** – appeal from decision of Federal Magistrate dismissing application for judicial review of decision of Migration Review Tribunal – whether Federal Magistrate erred in construction of certain aspect of public interest criterion – consideration of appropriate construction of criterion.

Legislation: *Migration Act 1958* (Cth) – ss 5(9), 97
Migration Amendment Regulations 2011 (No 1) (Cth) – regs 1.03, 5(2)
Migration Regulations 1994 (Cth) – Schedules 2, 4

Cases cited: *Mudiyanselage v Minister for Immigration* [2012] FMCA 887 – referred to
Singh v Minister for Immigration [2012] FMCA 14 – considered

Date of hearing: 8 March 2013

Place: Sydney

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs:	40
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**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 1560 of 2012

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

**BETWEEN: SURANGANI DILUPA WEERASINGHA MUDIYANSELAGE
Appellant**

**AND: MINISTER FOR IMMIGRATION AND CITIZENSHIP
First Respondent**

**MIGRATION REVIEW TRIBUNAL
Second Respondent**

JUDGE: TRACEY J

DATE OF ORDER: 27 MARCH 2013

WHERE MADE: MELBOURNE (HEARD IN SYDNEY)

THE COURT ORDERS THAT:

1. The appeal be dismissed
2. The appellant pay the first respondent's costs of the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 1560 of 2012

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **SURANGANI DILUPA WEERASINGHA MUDIYANSELAGE**
Appellant

AND: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

JUDGE: **TRACEY J**

DATE: **27 MARCH 2013**

PLACE: **MELBOURNE (HEARD IN SYDNEY)**

REASONS FOR JUDGMENT

1 1 This is an appeal from a decision of the Federal Magistrates Court dismissing
an application for judicial review of a decision of the Migration Review Tribunal
("the Tribunal"): see *Mudiyanselage v Minister for Immigration* [2012] FMCA 887.
The Tribunal had affirmed the decision of a delegate of the first respondent ("the Minister")
not to grant the appellant a protection visa.

2 2 The appellant is a Sri Lankan citizen who arrived in Australia in 2006 on a
student visa. On 21 October 2008 she applied for a Skilled (Provisional) (Class VC) visa.
The delegate made a decision to refuse the application on 25 September 2009. The appellant
then applied to the Tribunal for a review of that decision.

BACKGROUND

3 3 The Skilled (Provisional) (Class VC) visa was designed to permit graduates of
Australian educational institutions to remain in Australia temporarily for the purpose of
obtaining skills and qualifications which are necessary for them to qualify for permanent
General Skilled Migration visas.

4 The Skilled (Provisional) (Class VC) visa had two sub-classes. One of these was sub-class 485 (Skilled-Graduate).

5 In her application the appellant identified her skilled occupation as being that of a graphic pre-press tradesperson. In order to obtain the visa she had to satisfy a number of criteria. One of them was that she obtain a skills assessment from an assessing authority, which had been approved in writing by the relevant Minister, for her occupation. A second criterion was that no evidence had become available by the time the decision was made that any information given or used in support of the application was false or misleading in a material particular.

6 The appellant's application was supported by an assessment made by an organisation named Trade Recognition Australia ("TRA") which purported to be an approved assessing authority. The appellant had provided TRA with a written reference from a business known as Dinkums the Copy Centre ("Dinkums"). The reference was provided by a person named Don Mustafa who signed as "General Manager" of the business. The letter stated that the appellant had completed in excess of 920 hours of work experience with Dinkums during the period between June 2007 and March 2008. Her work was said to have been voluntary and involved obtaining experience of a kind relevant to an assessment of her skills.

7 The delegate of the Minister refused the appellant's application. He did so on a number of grounds including that the appellant had never been employed by Dinkums in any capacity, voluntary or otherwise, that Mr Mustafa was not the General Manager of Dinkums, that he had never been authorised to provide work reference letters on behalf of Dinkums and that the favourable skills assessment from TRA was, as a result, based, in part, on the false and misleading material contained in the reference from Dinkums.

8 On 15 October 2009 the appellant sought review of the delegate's decision in the Tribunal.

THE LEGISLATION

9 The Tribunal was not to conduct a hearing until late in 2011 and its decision was not delivered until early the following year. In the meantime the legislation had changed.

The second criterion referred to above at [5] had been repealed and replaced with a new public interest criterion. On 2 April 2011 the *Migration Amendment Regulations 2011 (No 1)* (Cth) came into effect. They substituted a requirement that applicants for a sub-class 485 visa satisfy the requirements of Public Interest Criterion 4020 (“PIC4020”) which was prescribed in Part 1 of Schedule 4 to the *Migration Regulations 1994* (Cth) (“the Migration Regulations”): see para 485.224(a) of Schedule 2 to the Migration Regulations. These amendments applied in relation to visa applications which had not been finally determined prior to 2 April 2011: *Migration Amendment Regulations 2011 (No 1)* (Cth), Reg 5(2). The appellant’s application had not been finally determined by that date because it remained under review by the Tribunal: see s 5(9) of the *Migration Act 1958* (Cth) (“the Act”).

- 10 10 PIC4020 was in the following terms:
- “(1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or Medical Officer of the Commonwealth a **bogus document or information that is false or misleading in a material particular** in relation to:
- (a) the application for the visa; or
- (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
- (b) ending when the Minister makes a decision to grant or refuse the application;
- the applicant and each member of a family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1) (a) or (b) and subclause (2) if satisfied that:
- (a) **compelling circumstances that affect the interests of Australia; or**
- (b) **compassionate or compelling circumstances that affect the interest of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;**
- (5) In this clause:
- information that is false or misleading in a material particular means information that is:
- (a) false or misleading at the time it is given; and
- (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.” (Emphasis added).

- 11 11 The term “bogus document” is defined in s 97 of the Act to mean a document that the Minister reasonably suspects is a document that:

- “(a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.”

The term bears the same meaning in PIC4020: see Reg 1.03 of the Migration Regulations.

APPEAL TO THE MIGRATION REVIEW TRIBUNAL

12 12 The appellant supported her application to the Tribunal with a certified copy of a letter from TRA dated 24 September 2009. The letter advised that its earlier skills assessment had been withdrawn. The appellant had lodged a new application for a skills assessment on 31 August 2009. It did not rely on the Dinkums letter. That assessment was processed. On 30 October 2010 the Tribunal was provided with a copy of a favourable skills assessment which had been given to the appellant by TRA in a letter dated 10 November 2009.

13 13 There matters rested until 13 December 2011 when the appellant appeared before the Tribunal. She accepted that she had never worked at Dinkums. She claimed to have undertaken in excess of 1000 hours of voluntary work experience as a pre-press tradesperson at three printing companies, Marvel Printing Industry, Dot Print and a third printer in Huntingdale purportedly owned by St Georges Institute (where the appellant was studying). She said that the work was organised by the job coordinator at St Georges Institute, Mr James Liew. She had had difficulty getting a work experience letter from Mr Liew in relation to the work, and that when he provided her with the letter, it purported to come from Dinkums.

14 14 The appellant claimed that she raised with Mr Liew her concerns about the company named in the letter as well as the fact that the letter had not been signed by one of her supervisors. He had told her not to worry as he owned the three companies at which she had volunteered. She claimed to have been led to believe that the letter was from one of the managing directors at the headquarters of the companies, and that this explained the use of the name Dinkums and the signature of a Mr Don Mustafa. She had submitted the letter as part of her TRA assessment on this basis. She claimed that subsequently she had completed over 900 hours of experience at Australia Post, for whom she then worked, and that, based on this work, she had obtained the second positive skills assessment from TRA.

THE TRIBUNAL'S DECISION

15 15 The Tribunal handed down its decision on 24 February 2012.

16 16 The Tribunal found that the appellant did not meet the requirements of PIC4020 because, notwithstanding the withdrawal of the first TRA assessment, the appellant had provided a bogus document (the assessment) to the Minister and that she had provided false and misleading information (the Dinkums letter) to the TRA in order to secure the assessment. The original skills assessment was a "bogus document" because it was a document that the Minister reasonably suspected was obtained because of the false or misleading statement that the appellant had undertaken voluntary employment with Dinkims. The Tribunal found that, even if the appellant was a victim of the fraud of Mr Liew and had since obtained a positive TRA assessment based on her work for Australia Post, her circumstances were not compelling. Consequently, the Tribunal found that it was not appropriate to waive the requirements of PIC4020(1) and affirmed the decision of the delegate to refuse the application for the visa.

THE FEDERAL MAGISTRATE'S COURT DECISION

17 17 On 5 June 2012, the appellant filed an amended application for judicial review of the Tribunal's decision in the Federal Magistrates Court. She alleged that the Tribunal had erred by failing to consider relevant information, taking into account irrelevant considerations and wrongly construing and applying PIC4020(4) which permitted the Minister to waive the requirement that the relevant public interest criterion must be met.

18 18 The appellant argued that the letter from Dinkums had only influenced the first assessment made by TRA. That assessment had been withdrawn and the second favourable assessment had not been influenced by it. It was this second favourable assessment which was before the Minister's delegate. The Tribunal had erred by failing to act on the second assessment and by taking the first into consideration.

19 19 The Federal Magistrate held that there was evidence before the Tribunal which entitled it to conclude that the first TRA assessment was a bogus document. That bogus document had been submitted in support of the appellant's application for a visa. It mattered not that it had subsequently been withdrawn and had not been acted on. There was, therefore,

evidence before the Tribunal that entitled it to conclude that the appellant had given or caused to be given a bogus document to the Minister in relation to her application.

20 20 The Federal Magistrate found that the second TRA assessment was not a matter that the Tribunal was required to consider when determining whether the appellant satisfied PIC4020(1): it was irrelevant to determining this issue.

21 21 The Federal Magistrate found that the exercise of the Tribunal's discretion not to waive the requirements of PIC4020(1) had not miscarried. A challenge to this finding was not pressed on appeal.

22 22 The application was dismissed with costs.

THE PRESENT APPEAL

23 23 In her notice of appeal, the appellant relied on four grounds. Only one of these was pressed. It was that the Federal Magistrate had erred in construing the phrase "bogus document or information that is false or misleading in a material particular" in PIC4020.

24 24 The appellant submitted that the words "in a material particular" appearing in criterion 4020(1) "related to both 'a bogus document' and 'information that is false or misleading ...'"

25 25 Although the appellant had not urged the Federal Magistrate to adopt such a construction, she contended that it was "grammatically sound and consistent with the evident purpose of ensuring that information which is pertinent to a visa application is accurate." Such a construction also reflected the common contextual link that both the production of a bogus document and information that is false or misleading must have with an application for a visa.

26 26 At the time at which TRA made its assessments it had not been appointed as a relevant assessing authority by the responsible Minister as required by regulation 2.26B(1A) of the Migration Regulations. In *Singh v Minister for Immigration* [2012] FMCA 145 Driver FM had held that, although the Tribunal had found that an applicant had given

false information about his employment in his visa application, this information was not false or misleading *in a material particular* because no relevant assessing authority had been lawfully approved or specified for the purposes of the criteria. The consequence was that the criteria had not been enlivened. The appellant argued that, by parity of reasoning, the submission of a bogus document could not be regarded as being material for the purposes of the application made by the appellant.

27 27 The Minister contended that the appellant should not be permitted to pursue an argument in this Court which was not advanced before the Federal Magistrate. Whilst it is unfortunate that the argument has been raised for the first time on this appeal, it is confined to an issue of statutory construction. The Minister was unable to point to any detriment flowing from the need for him to deal with it for the first time on appeal. The Minister had notice of the point and was able (as he did) to respond with detailed argument.

28 28 I have been persuaded, by the Minister's submissions, that the construction for which the appellant contends cannot be accepted. In the first place it would require PIC4020(1) to be read in an ungrammatical fashion: "a bogus document ... in a material particular ..." or "a bogus document ... that is false or misleading in a material particular." The former rendition is plainly ungrammatical. The second is less obviously so. Nonetheless, it may be thought inapt to speak of a document being false or misleading. That which may be false or misleading will be the contents of the document, not the document itself.

29 29 Secondly, the use of the disjunctive "or" suggests the existence of two separate ways in which an applicant may be found to have failed to meet the relevant criteria: either by submitting a bogus document *or* by providing information that is false or misleading in a material particular.

30 30 It is also significant that PIC4020(5) contains a definition of information which is to be regarded as false or misleading in a material particular while the term "bogus document" is separately defined in s 97 of the Act and then picked up by the Migration Regulations. The concept of materiality plays no part in the latter definition. Were PIC4020(1) to be read in the manner for which the appellant contends it would add this qualification to the statutory definition of "bogus document". The qualification would have

the potential to narrow the scope of the defined term. A document may, for example, be a bogus document because it is a counterfeit notwithstanding the fact that its contents are true and correct in every particular. Similarly, a document may be bogus because it has been altered by the insertion of some immaterial information by a person not authorised to amend the document. In either case there would be a bogus document but, because it did not contain information that was false or misleading in a material particular, the public interest criterion prescribed by PIC4020 would, nonetheless, be satisfied. The existence of the separate definitions of words and phrases appearing in PIC4020 tends strongly against a reading of PIC4020 which would deny those definitions their full force and effect.

31 31 The construction contended for the appellant strains the language of PIC4020. That contended for by the Minister does not: it flows from the ordinary and natural meaning of the text. PIC4020 is engaged if an applicant gives to a relevant entity either a bogus document or information that is false or misleading in a material particular when applying for a visa. The mere submission of a bogus document as defined in s 97 of the Act is sufficient to attract the operation of PIC4020(1) regardless of the contents of such a document.

32 32 The appellant did not seek to submit that the first assessment did not, for reasons other than the lack of materiality, fall within the definition of “bogus document”. A proper basis existed for a decision-maker reasonably to suspect that the first assessment had been obtained because of false or misleading statements appearing in the Dinkums letter: see s 97(c) of the Act.

33 33 The Federal Magistrate approached the construction of PIC4020 in this manner. She distinguished *Singh* on the ground that that case did not involve a bogus document.

34 34 The construction which I have placed on PIC4020(1) is supported by the terms of the explanatory statement which accompanied the promulgation of the amending regulations in 2011. The explanatory statement relevantly said that:

“Sections 97 to 106 of the Act, in general, place obligations on applicants to provide correct information and to correct any incorrect information whether at the time of application or subsequently prior to visa grant. In circumstances where incorrect information is provided, the Minister may cancel under section 109 of the Act any visa that has been granted. The application of section 109 of the Act depends on a visa having been granted.

Section 65 of the Act provides that after considering valid visa application, the Minister must grant the visa if the applicant has satisfied the prescribed criteria, provided that there are no statutory bars to the visa being granted. Currently, the power to refuse a visa application on the basis that the visa applicant (sic) has false or misleading information is extremely limited. The relevant Schedule 2 criteria are not of general applicability, and relate only to false or misleading information provided by a primary visa applicant to satisfy certain specific requirements. Further, it is common practice that a visa applicant will seek to withdraw the bogus documents, or false or misleading information or find alternative methods of satisfying the relevant visa criteria without relying on the false information. In circumstances where this occurs, a decision maker is required to accept the request to withdraw the information and continue to process the application.”

35 35 One of the stated purposes of the amendment was, then, to frustrate applicants who submit bogus documents when making a visa application in the hope that they will not be detected but that, if their deceit is exposed, they are able to eschew reliance on the document without prejudice to the success of their application. It may well be that this vice was overcome in any event by the former criterion in para 485.223 which required that, at the time at which a decision was made on an application, there must exist no evidence that information that was false or misleading in a material particular had been given or used to satisfy the primary criteria or to obtain a skills assessment. Whether that be so or not, the introduction of a materiality qualification to the definition of “bogus document” would plainly undermine one of the central stated purposes of the amended regulations.

36 36 In the Federal Magistrates Court the appellant argued that the Tribunal was bound to treat the first assessment by TRA as being irrelevant and the second assessment which did not rely on the Dinkums’ letter as the only relevant document. On the appellant’s construction of PIC4020 she was free to withdraw any reliance on the first TRA assessment because, once she had done so, it could no longer be regarded as material to her application. As earlier recorded, she also argued a lack of materiality, relying on the decision in *Singh*.

37 37 The appellant did not pursue a similar line of argument in this Court. That is understandable given that no relevant basis existed for distinguishing between the first and second TRA assessments. Both had been made at a time at which TRA was not an approved assessing authority. If this meant, as had been decided in *Singh*, that all of the criteria prescribed in relation to sub-class 485 visas had not been enlivened the result was that neither of the assessments could be regarded as material.

38 38 Having regard to the view which I have formed about the proper construction of PIC4020(1) it is not necessary that I express any concluded opinion about the reasoning in *Singh*. Although the Minister submitted that *Singh* was wrongly decided he did not seek to develop submissions in support of that proposition unless I considered that the construction of PIC4020 for which he contended was wrong. Furthermore, *Singh* was a case relating to information rather than a bogus document and was distinguishable on that basis.

39 39 Had it been necessary to rule on the issue I would not easily have been persuaded that the failure to approve a relevant assessing authority for the purposes of one criterion would have rendered all of the criteria for a particular visa inoperative or, more particularly, rendered any information supplied to the Minister in support of an application for such a visa immaterial.

DISPOSITION

40 40 The appeal must be dismissed with costs.

I certify that the preceding forty (40) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Tracey.

Associate:

Dated: 27 March 2013